

1 exhibit.

2 Q Okay. All right.

3 A And then we jumped to something else.

4 Q All right. So we got rumble strips. And
5 we got signage that should have been put down between
6 the rails; correct?

7 A Well, in my report it says what could have
8 been done.

9 Q Yeah. There is a heading "What Should Have
10 Been Done"?

11 A Yes.

12 Q In which you state rumble strips and
13 warnings?

14 A Yes.

15 Q That's what you are claiming should have
16 been done?

17 A But you were talking about opinions 1 and
18 2, and I explained at that time that the railroad did
19 absolutely nothing to prevent kids from running around
20 that track irregardless of the fact that they had
21 crossing watchmen there that seen the kids there.

22 Q Okay.

23 A They testified that they seen kids riding
24 on the cars, or grabbing onto the cars.

25 Q But here is what's confusing to me. When

1 you are saying we failed to maintain the segment of
2 railroad or we were negligent in maintenance of the
3 West 19th Street track, are you talking about the
4 failure to install rumble strips and the failure to
5 install signs?

6 A No, I'm talking about the railroad failed
7 to maintain the -- maintain the track between West
8 19th Street in a condition that would have prevented
9 accidents. That does not -- maintain keeps track of
10 the entire track, not the ties or the ballasts or
11 anything like that. They didn't maintain any kind of
12 -- they didn't schedule any kind of action by the
13 railroad to prevent kids from playing on the tracks.

14 Q Such as what?

15 A What?

16 Q Such as doing what besides putting these
17 rumble strips in or signs?

18 A You always jump back to the rumble strips.
19 I'll get to that -- you want to go to that now?

20 Q No, I don't. Because I just want to make
21 sure that I understand what you are contending under 1
22 and 2.

23 A And I explained that.

24 Q No --

25 MR. SOLYMOSI: That's been --

1 Q Not to my understanding.

2 MR. SOLYMOSI: That's been asked and
3 answered.

4 MR. TAFT: I don't think it has.

5 Q What program have you identified in here,
6 besides rumble strips and signs between the tracks
7 that you claim Norfolk Southern should have done to
8 maintain that segment of the railroad?

9 A To maintain that stretch of the railroad
10 meant in this condition, put it in perspective of the
11 injury to kids or injury to anybody, Norfolk Southern
12 Railroad did absolutely nothing to prevent any kind of
13 accidents on that property by putting up signage or
14 anything, but yet they had crossing watchmen there on
15 certain days that admittedly seen kids catching on and
16 playing around the tracks. But they did nothing.
17 They did not report them to their superiors.

18 Those people never had any training by
19 Norfolk Southern of what to do when they seen kids out
20 there. So absolutely, they did absolutely nothing to
21 maintain that track in a safe condition along West
22 19th Street.

23 Q I guess you mentioned it before, you are
24 saying they should have notified the City Police?

25 A The standard in the industry, they should

1 have notified their superiors.

2 Q Then what?

3 A Then their superiors, the dispatcher or
4 their superiors would notify the police or the
5 railroad police, if they had them, and usually Norfolk
6 Southern had railroad police, and then they would
7 notify the Police Department Erie, Pennsylvania, that
8 there are children playing down along our tracks.

9 Q And then what?

10 A We would like to have you come down, see if
11 you can do something about it. Then it would be the
12 City of Erie responsibility to follow up on that. And
13 then somebody from the railroad should have followed
14 up, a train master or somebody should have followed up
15 and seen are they doing anything to prevent kids from
16 playing around the tracks and trains when they go
17 through town.

18 Q Well, are you contending that the police,
19 if they had been notified, should have stationed
20 people there in case some kid like Robin Nixon came
21 along on a Sunday?

22 A I didn't say that. You are putting those
23 things --

24 MR. SOLYMOSI: Roger, I'm going to object.

25 That's been asked and answered. If you are going

1 to ask it again, you are going to need a Court
2 Order to get him to answer it again. It's clear
3 what he said here. He said it and it's been
4 answered.

5 MR. TAFT: It's not clear and I'll be happy
6 to move on. The transcript will speak for
7 itself.

8 Q Item 4 or opinion 4 says "Norfolk Southern
9 was negligent in the operation of trackage on West
10 19th Street in a manner that totally disregarded the
11 presence of children who were known to play on or near
12 and near the tracks." Is that the same as the first
13 three?

14 A No, this is different.

15 Q Okay. What's this?

16 A "Norfolk Southern Railroad was negligent in
17 the operation of trackage." Now, the operation would
18 mean a train going down the track and the people
19 assigned to that train, Mr. Price and Mr. Glenn, did
20 absolutely nothing, admitted that they didn't have any
21 responsibility to look on either side or to notify any
22 children or anything.

23 The standard in the industry is to those
24 employees on the train have to be vigilant and alert.
25 Any time they see children playing around the tracks

1 or around in the area, they are to notify the train
2 dispatcher and they in turn will notify the City of
3 Erie Police. It's the standard in the industry.

4 Q Well, Mr. Westphal, instead of talking
5 about the standard in the industry all the time, what
6 did you see in the materials that you reviewed very
7 carefully that led you to believe that Robin Nixon
8 would have been visible to anyone on that train crew
9 on the Sunday morning, April 27, 1997?

10 A Well, they went by, they were by already.
11 My understanding they were by that point already.

12 Q Right.

13 A They wouldn't have seen him.

14 Q They wouldn't have seen him at all. So if
15 they didn't see him, what would that train crew have
16 been able to do to have avoided Mr. Nixon's accident
17 because they never saw him?

18 A Mr. Taft, it's not just Robin Nixon. It's
19 all children around in there. The engineer and
20 conductor, Glenn and Price, did absolutely nothing to
21 warn any, at any time they admitted that they didn't
22 do anything. Like they were going down there with
23 blinders on, like they didn't even have to look out
24 the window to see where they were at. It was a total
25 disregard for safety.

1 Q On the morning of the accident they had
2 already gone through by the time he showed up?

3 A I answered that already.

4 Q Okay. Let's go to number 5. You opine
5 that "Norfolk Southern Railroad was negligent in the
6 operation of the trackage at West 19th Street by
7 failing to display any signage to warn children of the
8 danger of playing on or near railroad tracks." Now,
9 are we now to putting of the signs that Mr. Guarino
10 references in his report?

11 A No, because at the time of this accident
12 they didn't have any signs up there.

13 Q But is your contention in this opinion that
14 Norfolk Southern should have installed the signs that
15 Mr. Guarino referenced in his report "DANGER-NO BIKES"
16 between the rails?

17 A Yes, that would have added to it, in my
18 opinion, those signs that Mr. Guarino put big letters,
19 24 inches high and yellow strip across and rumble
20 strips down the side would have been a great deterrent
21 from those children playing on the tracks.

22 Q But that's the signage that you are
23 referring to in opinion 5?

24 A No, no, no, no, no, no, you brought that
25 up.

1 Q You tell me, then, Mr. Westphal, what
2 signage are you referring to in No. 5--

3 A The railroad company has big signs, they
4 say "No Trespassing," "Keep Away," "Trains Moving."
5 They have a national program that's Operation Life
6 Safer that they go to schools and they teach kids stay
7 away from railroad tracks. Of course, they didn't
8 participate in that here. Norfolk Southern didn't
9 participate in that. I didn't see anything on that.

10 Q You didn't ask one way or the other, did
11 you?

12 A It was in the report that I guess Robin
13 Nixon he said that nobody ever come to my school and
14 told us about that.

15 Q So --

16 A But to get back to your question, they have
17 signs that say "stay away from the trains" and they
18 could have put up other signs when they knew the
19 children were up and down there. They could have put
20 up signs up there that had an "X" on them, children on
21 bicycles or something like, stay away from the trains.

22 Q Mr. Westphal, let's get to a real basic
23 fact, isn't it true that West 19th Street is a public
24 street?

25 A It's a public street with the Norfolk

1 Southern tracks running right down the middle.

2 Q Isn't it true that the Norfolk Southern
3 right-of-way runs from end of tie to end of tie on
4 that track line?

5 A It would depend upon what the negotiation
6 were for installing that track.

7 Q Well --

8 A But I agree with you.

9 Q Yeah, you read the deposition transcripts
10 carefully, and isn't it a fact that the undisputed
11 testimony is that the Norfolk Southern's right-of-way
12 only was from end of tie to end of tie through the
13 middle of 19th Street?

14 A Yes.

15 Q And isn't it true because it's undisputed
16 that the rest of 19th Street was a public street owned
17 and maintained by the City of Erie; correct?

18 A Yes, that would not have prevented them
19 from putting up a sign up there and putting signage up
20 that I mentioned before, but they didn't do it.

21 Q Signage on someone else's property?

22 A Put them up on the side or on the telephone
23 pole. They do that.

24 Q Wait a minute now. You are suggesting that
25 Norfolk Southern put big signs up on someone else's

1 property; is that right?

2 A Well, no, just put up a sign, put up a sign
3 up on a post.

4 Q Okay, now, keep in mind, Norfolk Southern's
5 property --

6 A I know what, where you are getting at.

7 Q So you want Norfolk Southern to post signs
8 on someone else's property?

9 A Just put them on a telephone post. They
10 can get permission. If Norfolk Southern was aware of
11 the fact and wanted to do anything about it, they
12 could go to the City and say would you mind if we put
13 up a sign to protect the children in your city from
14 staying away from our trains. I don't think Norfolk
15 Southern or the City of Erie would say, oh, no, don't
16 do that, we don't care about our children.

17 Q Is it your understanding the City of Erie
18 knew nothing about children in the vicinity of these
19 tracks before this accident?

20 A Well, I don't know really.

21 Q Okay.

22 A Norfolk Southern never reported it to them.

23 Q And so as far as you know, the City had no
24 knowledge of this?

25 A Norfolk Southern never reported it to them.

1 Q Okay. So aside from that, you are
2 suggesting that the City of Erie, whether or not
3 Norfolk Southern reported it, City of Erie was not
4 aware that there were children in the vicinity of 19th
5 Street?

6 A I couldn't agree with that, if it's a good
7 City Police Department.

8 Q As far as you know, did the City post any
9 signs?

10 A There were no signs there.

11 Q Let's go to number 7. Excuse me, let's go
12 to number 6. "Norfolk Southern Railroad was negligent
13 in failing to recognize the danger involved in placing
14 a track structure in the middle of a city street and
15 failing to install signage to warn of the danger that
16 was present." Is that the same as we were discussing?

17 A The same as we were discussing. They were
18 totally negligent in that.

19 Q They should have put signage between the
20 rails and they should have posted something else on
21 someone else's property?

22 A Well, they could have put signage in the
23 middle as Mr. Guarino recommended.

24 Q Yeah.

25 A That would have been a deterrent. They

1 could have put rumble strips there, but they did
2 nothing.

3 Q Let's go to number 7. "Norfolk Southern
4 Railroad was negligent in failing to recognize the
5 danger of placing railroad tracks within a residential
6 and industry area and failing to install a type of
7 rumble strip and warning signage between and along
8 both sides of the track to prevent children from
9 riding bicycles along the edge of the track and/or
10 next to a moving train. The rumble strips would have
11 prevented Robin Nixon's accident." That's your
12 opinion number 7?

13 A Yes, and I fully believe that.

14 Q And that's based on the information in
15 Mr. Guarino's report regarding the rumble strips and
16 the signage between the tracks?

17 A Yes.

18 Q Now, you told me earlier, if I'm not
19 mistaken, that you don't contend to be an expert in
20 human factors; correct?

21 A I'm not an expert in human factors per se,
22 but I do deal with -- I deal with people all the time
23 and I dealt with people when I worked on the railroad.
24 So if we are going to mix apples and oranges there, I
25 do know how -- I do know, realize how another human

1 being acts and responds.

2 MR. SOLYMOSI: Roger, why don't you define
3 what you mean by an expert in human factors.

4 Q You don't have any education, Mr. Westphal,
5 in addition to a high school education; correct?

6 A In what?

7 Q In anything.

8 A Yes, I do.

9 MR. SOLYMOSI: Define education now.

10 MR. TAFT: Excuse me, I'll ask the
11 questions. If he wants to ask me to clarify
12 that --

13 MR. SOLYMOSI: I'm going to object if you
14 have a question that's not clear.

15 Q Mr. Westphal, you don't have any formal
16 education beyond a high school degree? You never
17 attended college, you never attended graduate school.
18 You don't have any professional certifications in
19 human factors, in psychology, in warnings or any of
20 those things; correct?

21 A And I'm not a doctor either.

22 Q Right.

23 A But Mr. Taft, I do have the railroad
24 experience that you can get nowhere else than on the
25 railroad.

1 Q We are now talking about warning signs and
2 effectiveness of warning signs, because you are
3 contending that if this warning sign that Mr. Guarino
4 suggested which says "DANGER-NO BIKES" had been
5 between the rails, this accident wouldn't have
6 happened?

7 A It would have been a great deterrent.

8 Q To Robin Nixon?

9 A To any bicyclist.

10 Q We are not talking about any bicyclist. We
11 are talking about Robin Nixon's accident. It's your
12 contention if that sign "DANGER-NO BIKES" had been put
13 in between the rails, as Mr. Guarino recommended, and
14 you agreed with, Robin Nixon's accident wouldn't have
15 happened?

16 MR. SOLYMOSI: Object to the
17 characterization you are putting to his
18 testimony. His testimony in his report was that
19 the signage, along with the rumble strips would
20 have prevented it, Roger. You are putting words
21 in his mouth.

22 Q Are you saying that that signage would have
23 deterred the accident?

24 A Mr. Guarino's report is entirely different
25 than what you are reporting it to be. You are taking

1 it piece by piece and his is rumble strips and the
2 signage in there.

3 Q Okay. But you are saying you think that
4 signage would have made a difference to Mr. Nixon to
5 have prevented his accident?

6 MR. SOLYMOSI: Is your request just the
7 signage?

8 MR. TAFT: Yes, we are going to take them
9 one at a time.

10 MR. SOLYMOSI: Be clear on that.

11 Q If the signage had been there and no
12 rumble --

13 A My opinion if the signage had been in there
14 before, long before, why then it would have deterred
15 not only Mr. Nixon, but other children who might be
16 riding along in there.

17 Q Let's talk about that for a minute. On the
18 day of the accident, there was a train that was
19 running along the track; correct?

20 A Yes.

21 Q How would signs between the rails have
22 deterred Mr. Nixon on the day of the accident if there
23 was a train running over those signs?

24 A Mr. Taft, the signs don't disappear when
25 the train goes by. The signs would still be in

1 between the tracks where children would notice them,
2 large 24 inches size letters, "No Bikes," "Danger."
3 Children would recognize that or somebody could point
4 them out to them and they would probably stay away.

5 Q Do you know whether Mr. Nixon would have
6 seen those signs before the accident?

7 A If he looked at them, if he was there -- if
8 he was down on that street, anybody would have seen
9 them. 24 inch letters, they are going to look to see
10 yellow letters in between the tracks, they are going
11 to see them.

12 Q And if it read "DANGER-NO BIKES" between
13 the tracks, do you think Mr. Nixon would have
14 interpreted that, if he even saw it, as don't ride
15 your bike between the tracks?

16 A I would assume so.

17 Q Now, let's go to the rumble strips, I think
18 we are getting into those now. The rumble strips that
19 Mr. Guarino and you are recommending be installed
20 would have been on the outside of the rails on both
21 sides; is that correct?

22 A Well, first of all, Mr. Guarino's report is
23 the one that recommended the rumble strips. I concur
24 in that report.

25 Q Okay.

1 A I didn't recommend. He recommended them
2 and I concur in that. I think it's a very safety
3 conscious program.

4 Q And that's what I'm trying to ask you about
5 as to why you concur with it. But these rumble strips
6 would have been on both sides of the rails?

7 A Yes.

8 Q On the outside?

9 A On the outside of the rails, yes.

10 Q And in his report he states that these
11 strips, these rumble strips would be of the same type
12 as were used, I think he said on interstate highways.
13 Page 1, second paragraph, item 1. The same type that
14 you would see along shoulders on interstate highways,
15 is that right?

16 A Yes.

17 MR. SOLYMOSI: Page one of what, Roger?

18 MR. TAFT: Mr. Guarino's report.

19 A "2.4 miles of rumble strips approximately
20 16 inches to 17 inches long and 7 inches wide on one
21 foot centers, approximately five inches deep, the same
22 type that you would see along shoulders of interstate
23 highways," yes.

24 Q Mr. Westphal, in your review of materials
25 in an effort to come up with your opinions in this

1 case that we have been discussing, and specifically
2 with respect to your opinion on rumble strips, did you
3 locate even one study that suggested that rumble
4 strips should be installed on a public street in order
5 to deter bicyclists from grabbing onto moving trains?

6 A Repeat that question.

7 (Read back.)

8 A First of all, I don't understand the last
9 part of your question. Bicyclists wouldn't grab onto
10 moving trains on a highway because there is no tracks
11 there, there is no trains there. I don't understand
12 your question, Mr. Taft.

13 Q Isn't it true that the studies that you
14 reference in your report that you reviewed, which are
15 the two Federal Highway Administration reports, items
16 23 and 24, and also the report that you mention but
17 never read in its entirety from the Pennsylvania
18 Transportation Institute, the project by Elefteriadou,
19 all of those involved rumble strips on interstate
20 highways on the berm, all of them did?

21 A For cars and for bicyclists, yes.

22 Q None of them involve railroad tracks, do
23 they?

24 A No, because they don't have railroad tracks
25 up on the highways.

1 Q Exactly.

2 A That's why I don't understand your
3 question.

4 Q That's what I'm trying to get to, because
5 we are talking about your opinion that in this case
6 rumble strips should have been installed on the City
7 street to prevent people from grabbing onto moving
8 trains, not on an interstate highway to wake up
9 drivers that may doze off, you are recommending that
10 they be installed on West 19th Street, a city street,
11 to deter people from grabbing onto moving trains while
12 riding bicycles?

13 A That was in Mr. Guarino's report.

14 Q Right, which you --

15 A And I concur in that.

16 Q Have you located one single published study
17 that said that what you and Mr. Guarino are
18 recommending, namely installing rumble strips along a
19 city street, is the way to prevent bicyclists from
20 grabbing onto moving trains?

21 A Well, the studies that I read here before,
22 and as I outlined in my report, they were on highways
23 and they were rumble strips.

24 Q Right.

25 A And they are also in those reports it had

1 about bicycles. Now, Mr. Guarino's report is
2 recommending that to deter bicyclists or kids from
3 riding bicycles along the trains, the very thing that
4 caused this accident, they would have been able to put
5 this down along the tracks, regardless of any study
6 had ever been made. They should have done something
7 like this, to at least do something instead of
8 nothing.

9 Q I guess the answer is no, then, you are not
10 aware of any published study --

11 A It's just what my answer is what I said.

12 Q I want to clarify so we don't have a
13 mistake. You have not found, as far as you know, such
14 a study doesn't exist that recommends the same thing
15 that you and Mr. Guarino are recommending, that rumble
16 strips be installed on a city street to deter
17 bicyclists from grabbing onto moving trains?

18 A All --

19 Q Not a single one?

20 A Only where the -- the only study that was
21 ever made was by Mr. Guarino, and he recommended this
22 and I concur with it. That they should have, Norfolk
23 Southern should have done something to install rumble
24 strips and put the signage in between the rails to
25 deter children from grabbing onto these tracks --

1 these trains. They don't have these train tracks any
2 more.

3 Q This isn't a study, isn't it, it's just a
4 report?

5 A It's a report and a review -- he studied
6 it. He studied it, made a report, he didn't pull this
7 out of thin air. He had to take some serious
8 consideration into this.

9 Q Looking at his report, which you reviewed,
10 show me what he studied to come up with this
11 conclusion.

12 A I guess his background in installing rumble
13 strips.

14 Q Okay.

15 A And a recommendation. He certifies that
16 this report is his opinion.

17 Q Right. Okay. Let's go to No. 8. "Norfolk
18 Southern Railroad was negligent in failing to properly
19 install and maintain proper warning striping along the
20 street surface to warn children and traffic of there
21 being dangerous railroad track in close proximity."

22 What are you talking about "proper warning
23 striping along the street surface"?

24 A You can put yellow, they put on the
25 highways when they are going to warn people to stay

1 away from a certain place, and they direct the
2 traffic, they put this plastic tape on the highway,
3 it's a yellow reflectorized tape. Norfolk Southern
4 could have done the same thing here.

5 Q This is a city street, correct?

6 A Yes.

7 Q Okay. The City didn't do that, did they?

8 A We are talking about -- I said the Norfolk
9 Southern could have done it.

10 Q On the City street?

11 A Right on the edge of their right-of-way.

12 Q Let's talk about their right-of-way. You
13 agreed with me, and the record is clear, that the only
14 right-of-way Norfolk Southern had was from end of tie
15 to end of tie --

16 A That's correct.

17 Q -- right? And end of tie to end of tie is
18 8 feet 6 inches?

19 A That's correct.

20 Q So you are saying that somewhere between
21 the end of tie to end of tie there should have been
22 striping --

23 A Yes.

24 Q -- put in?

25 A Put it on the end, as a striping for people

1 to stay away from it.

2 Q Are you aware that the coal cars and other
3 cars that pass over that track extend out beyond end
4 of tie?

5 A Well, yes, they would.

6 Q Okay. So you want the striping to appear
7 in a part of that street that is being covered by a
8 moving train?

9 A But the coal cars are not always there,
10 Mr. Taft. The striping would be there all the time as
11 a warning to people, don't go, don't get beyond this
12 stripe. It wouldn't be there just when a train was
13 going by, it would be there all the time.

14 Q Let's go to No. 9. "Norfolk Southern
15 Railroad was negligent in failing to properly train
16 their employees to watch and direct children away from
17 tracks and have in place and/or initiate accepted
18 methods and procedures to reduce or eliminate
19 accidents which would or should have been known to
20 occur."

21 Is that the same thing that you were
22 discussing earlier with respect to, I think it was
23 your first three or four opinions?

24 A No.

25 Q Okay. What is this?

1 A This one is the Norfolk Southern, as I said
2 before, had engine crews that did nothing whatsoever
3 to warn anybody that there was children around, that
4 they should have seen. Admitted that they didn't,
5 didn't have to look, which is wrong.

6 And then Norfolk Southern had in place
7 crossing watchmen, whether it was on Monday, Tuesday,
8 Wednesday or school year, they had them there, they
9 could have -- and they seen, admittedly seen children
10 playing along the side of the trains.

11 And one, Mr. Rockey said he seen one
12 grabbing on a bicycle, and they did nothing to report
13 that to their supervisors. They never reported to the
14 dispatcher, not through the Police Department,
15 nothing, to deter this practice of children around the
16 trains. Did absolutely nothing.

17 Q And you --

18 A No training program whatsoever.

19 Q And you are saying if that had happened,
20 Robin Nixon's accident would not have occurred, he
21 would have been deterred?

22 A It could have very well deterred from his
23 accident or any other child.

24 Q Let's go to No. 10. "Norfolk Southern
25 Railroad was negligent in failing to provide a minimum

1 amount of training for crossing watchmen in place to
2 guard children in their passing over the tracks in
3 three locations of West 19th Street." What do you
4 mean by that?

5 A Their testimony here, these people had no
6 training whatsoever. They were brought on on-the-job
7 training. There was a, supposed to be a poster inside
8 the little hut that they had to read, that was their
9 on-the-job training. But they had no training
10 whatsoever, by their own admission, to report any kind
11 of children around the tracks or anything of that
12 nature. The one said, one of the crossing watchman
13 said that he understood his job when the train went
14 through just to see if the train went through.

15 Q They weren't even working on Sunday when
16 the Nixon accident happened --

17 MR. SOLYMOSI: Asked and answered.

18 Q -- is that right?

19 A We went over that three or four times.

20 Q You are telling me about days that they are
21 working, and I just want to make clear that we --

22 A On the morning of this accident involving
23 Robin Nixon, which is the basis for this lawsuit, none
24 of those crossing --

25 MR. SOLYMOSI: Asked and answered, Roger.

1 Move on.

2 THE DEPONENT: Can we go back to No. 10?

3 MR. SOLYMOSI: It's been asked and
4 answered.

5 THE DEPONENT: I've answered it already.

6 MR. TAFT: What's the answer?

7 MR. SOLYMOSI: Read in the transcript.

8 MR. TAFT: No, if you are going to state
9 something again, new opinion, I want to make sure
10 the record is clear that you agree with me that
11 on Sunday, there were no crossing watchmen
12 working?

13 MR. SOLYMOSI: It's been asked and
14 answered, Roger.

15 THE DEPONENT: I stated in answer to, when
16 you read No. 10, I went in detail to explain just
17 exactly the lack of ability of Norfolk Southern
18 what they did. And that's on the record and then
19 you bring in on Sunday. I didn't mean Sunday.
20 When they were on duty, I said Monday, Tuesday,
21 Wednesday, Thursday, in the summer, or the
22 winter. Do you remember when I said that?

23 Q Sure. Record is clear on that. But what
24 I'm --

25 A Let me finish.

1 Q Go ahead.

2 A And I went on in detail to show how they
3 did nothing. They did nothing. They didn't train
4 them to do anything. And they were, the only on-job
5 training was a poster on the inside of the hut.
6 That's in their testimony. They did absolutely
7 nothing.

8 Now, if they had done something, it would
9 have been a deterrent to all the children, not only
10 Robin Nixon.

11 Q What should they have done?

12 A They should have reported it to their
13 superiors.

14 Q Okay.

15 A They should have had training on what to
16 do, and they never had any training whatsoever.

17 Q Okay. All right. We have gone over that
18 before. No. 11, "Norfolk Southern was negligent in
19 the training and application of the operating rules of
20 their employees in the instant train operation." What
21 do you mean by that?

22 A The conductor -- they didn't have any, they
23 didn't, evidently they didn't have any qualifications
24 on the operating rules of Norfolk Southern because the
25 conductor didn't know whether he was in charge of the

1 train or he was in charge of the train with the
2 engineer. The conductor didn't have, he said he
3 didn't have any responsibility of looking out the
4 window or anything. That wasn't his responsibility.
5 He was supposed to look right straight down the track
6 and that is totally untrue. Any safety officer of the
7 Norfolk Southern would just chastise that person for
8 that statement.

9 Q Well, that's your interpretation of a
10 deposition testimony, and I understand that's why you
11 are providing your opinions, but you are mistaken,
12 were you not, because the conductor was on the right
13 side of the cab, not the left side?

14 A Well, I disagree with you on that. This is
15 wrong and I would challenge that. If there is any
16 locomotive, if any locomotive operating in the United
17 States today that has one single control stand on the
18 left side of the locomotive, I'll eat your lunch for
19 the next year.

20 Q So you are disputing what --

21 A Deposition Exhibit No. 4 from Mr. Glenn is
22 totally false.

23 Q And Mr. Glenn's testimony is totally false,
24 too?

25 A This diagram is totally false.

1 Q And his deposition testimony is consistent
2 with the diagram, is it not?

3 A Then it would be false.

4 Q Okay. You have never seen this locomotive
5 yourself, have you?

6 A It doesn't -- a locomotive is a locomotive
7 under the Federal Railroad Administration. They don't
8 have them on this side and on that side. They all
9 have to be uniform. Everything in the railroad
10 industry is uniform. And besides that, it wouldn't
11 make any difference which side they were on, they
12 didn't do anything.

13 Q I'm not -- at this point I'm just looking
14 at what you are contending as to where they were, and
15 so you are saying Mr. Glenn is wrong in his testimony
16 and his diagram even though you never seen this
17 engine?

18 A I wouldn't have to see it.

19 Q Okay.

20 A This is wrong.

21 Q Okay.

22 A It does not comply with the Federal Rules
23 of Regulations pertaining to railroad equipment.

24 MR. TAFT: Let's mark that as an exhibit.

25 THE DEPONENT: It's Exhibit No. 4.

1 MR. TAFT: That's your copy, but let's mark
2 it as Westphal Deposition Exhibit just so there
3 is no dispute over this issue.

4 (THEREUPON, Westphal Deposition Exhibit No.
5 11 was marked for identification.)

6 Q I'm marking it as Westphal Deposition
7 Exhibit 11 the diagram we have repeatedly referred to
8 as Glenn Deposition Exhibit 4 that you saw for the
9 first time today; correct?

10 A Yes.

11 MR. SOLYMOSI: What number is that?

12 MR. TAFT: That's 11.

13 Q Let's get back to opinion No. 11, they were
14 "negligent in the training and application of the
15 operating rules of their employees in the instant
16 train operation." Specifically in what way were they
17 negligent in training these people?

18 A They didn't comply with the operating
19 rules.

20 Q Cite me to a rule and tell me why they
21 didn't comply?

22 A First of all, the general note, "safety is
23 of the first importance in the discharge of duty."

24 They totally ignored the safety part on the railroad.

25 The second one, the general rules, "the

1 employees whose duties are prescribed by these rules
2 must provide themselves with a copy. Employees whose
3 duties -- "

4 Q Wait a minute, are you claiming that they
5 did not have a copy of the operating rules?

6 A They didn't -- they must not have had them
7 because they didn't comply with them.

8 Q Well, that's your assumption, right?

9 A They didn't, they said they didn't.

10 Q They said they didn't have a copy of the
11 rules?

12 A No, no, they said -- he didn't have to look
13 forward, he didn't have to be vigilant. So he must
14 not have had edification at all on it.

15 Q I want to take it slow, Mr. Westphal. Are
16 you contending these employees violated that rule
17 because they didn't have a copy of the rules?

18 A Yes, they would. They violated the rules
19 because if -- the rules said --

20 Q Right. Where in the record that you
21 reviewed very carefully is there any indication that
22 they did not have a copy of the rules?

23 A Well, it's my opinion that they did not
24 have them.

25 Q It's your speculation?

1 A Yes.

2 Q Move on. Next?

3 A No, it's my opinion, not my speculation.

4 Q Well, you didn't see anything to indicate
5 they didn't have a rule?

6 A It's my opinion. It's not my speculation.

7 Q What's the basis of your opinion?

8 A Because they said they didn't have to look
9 forward and that's one of the cardinal rules, they
10 didn't have to look sideways out and be alert and
11 vigilant.

12 Q So because you feel they violated a rule
13 means that you have the opinion that they didn't even
14 have the rule book?

15 A That's correct.

16 Q Keep going.

17 A Now, "members of the crew must observe the
18 condition of their train and inspect it at frequent
19 intervals when it is moving. While practical, they
20 will look back at the track frequently to see if
21 damaged equipment and also blocked signals and roadway
22 structures to see if they have been struck by objects
23 protruding from their train."

24 Q You claim that they violated that rule?

25 A Yes.

1 Q How did the violation of that rule cause
2 Mr. Nixon's accident?

3 A Because -- I didn't say that. We are
4 talking about the operating rules.

5 Q Yeah, but I'm asking when you are claiming
6 that violation of the rules by this crew were a cause
7 of the accident, I think you are saying that, I'm
8 asking you how a violation of a particular rule caused
9 this accident?

10 A Let's look at that opinion again. No. 11
11 "Norfolk Southern was negligent in the training and
12 application of the operating rules of their employees
13 in the instant train operation."

14 Q Are you contending that as a result of
15 that, Mr. Nixon's accident was caused?

16 A No, no. I'm talking about the training and
17 the application of the rules to these employees.

18 Q Okay.

19 A They were negligent because they didn't --
20 the employees knew nothing about the operating rules.

21 Q Okay. Let's go on. Is that true for all
22 the operating rules you claim are violated?

23 A Yes.

24 Q Okay.

25 A Now, wait. The ones I'm pointing out.

1 Q Okay. Well, keep going. Point out another
2 one that you claim was violated.

3 A "Undivided attention to duty is required.
4 While on duty employees must not engage in any
5 activity that will interfere with the, distract their
6 attention from their work."

7 Q What did you see in the record that led you
8 to conclude they violated that rule?

9 A Mr. Glenn said he didn't have any
10 responsibility to look sideways. All he had to do was
11 look straight ahead.

12 Q Well, this rule has to do with engaging in
13 activities that will interfere with or distract their
14 attention.

15 A Yeah, yeah.

16 Q What did you see in the record that
17 suggests that they were being distracted from their
18 work?

19 A All he said I have to do is look straight
20 ahead. If he is saying that, he is saying I don't
21 have to look at nothing else, see.

22 Q And tell me how a violation of that rule
23 caused Mr. Nixon's accident?

24 A We are talking about the operating rules..

25 Q How did a violation of that operating rule

1 that you claim occurred cause Mr. Nixon's accident?

2 A Okay. We'll go back over it one more time.

3 Had these employees, the engineer and the conductor,

4 in their travels up and down that track on 19th

5 Street --

6 Q On the day of the accident?

7 A Any time.

8 Q No --

9 A Any time. Let me answer the question.

10 Q Okay.

11 A Any time. Had they established a practice

12 of noticing children which were out there and

13 notifying the train dispatcher there are kids playing

14 around the train, along the track, and the dispatcher

15 would know about it, then he would come back to the

16 Erie Police and they would do, take, get to their

17 train master, establish some type of a program on the

18 railroad with the police and the employees to keep

19 those kids away from -- you wouldn't have to do it

20 over one or two times, and I think the message would

21 get through to them, along with the signage in the

22 middle of the track.

23 Q Keep going.

24 A Now, "conductors are directly responsible

25 to and must obey the orders of division and terminal

1 officers. They must obey the instructions of station
2 yard masters which are employed. Conductors must
3 maintain records and compile reports required by the
4 proper authority. Conductors have charge of trains to
5 which they are assigned all the employees thereon.
6 They are responsible for safe and proper management of
7 their trains for protection and care of passengers and
8 property, for performance of duty by train employees
9 and for observance and enforcement of all rules and
10 instructions."

11 Mr. Glenn didn't even act like he knew that
12 rule was in the book.

13 Q And you are saying a violation of that rule
14 caused Mr. Nixon's accident?

15 A I'm saying that was a violation of the
16 operating rules.

17 Q Are you saying that a violation of that
18 rule caused Mr. Nixon's accident on April?

19 A Generally over a long period of time, yes.

20 Q Okay. What else?

21 A "Engineers are directly responsible to and
22 must obey the orders of the division terminal officers
23 within shop limits. They are under the directions of
24 shop supervisors. They will obey the instructions of
25 yard masters and of their conductor with respect to

1 the general management of their trains. Engineers are
2 responsible for properly performance and handling of
3 engines, for care of equipment and economical use of
4 fuel and supplies." They were --

5 Q Tell me what you saw in the record to
6 indicate that the engineer violated that rule?

7 A The engineer didn't indicate that he had
8 any responsibility either of looking back along the --

9 Q And you think that's covered by that rule?

10 A Yes.

11 Q Okay. And how did the violation of that
12 rule, if it happened, cause Mr. Nixon's accident?

13 A Just generally their whole, total ignorance
14 of the rules in a condition of railroad where it's a
15 dangerous operation.

16 Q What else?

17 A And of course, all of the tenants of
18 safety, the six rules. They didn't, nobody seemed to
19 even know what those were.

20 Q You got them listed in your report;
21 correct?

22 A Yes.

23 Q And how do you contend a violation of those
24 rules caused Mr. Nixon's accident?

25 A Every rule in that book could contend to

1 safe operation of the railroad.

2 Q I'm talking about the six point action
3 plan.

4 A Well, all injuries can be prevented. They
5 could have prevented the injury to Robin Nixon by
6 doing the things that I pointed out six or seven times
7 already.

8 Q Mr. Westphal, are you aware that the
9 Norfolk Southern six point action plan involves
10 injuries to railroad employees?

11 A I don't believe -- I believe it covers
12 everybody.

13 Q Do you know that for a fact?

14 A "Each employee of this corporation
15 therefore is held personally accountable for his or
16 her actions on the job."

17 Q Right.

18 A It doesn't say except engineers or except
19 conductors, except crossing watchmen.

20 Q No, what I'm saying is are you aware that
21 those rules that you just cited have to do with safety
22 within the Norfolk Southern group of employees as
23 opposed to safety practices to third parties?

24 MR. SOLYMOSI: Roger, are you stating that
25 as a fact? Are you testifying now?

1 A I answered that.

2 Q What is your answer?

3 A It's on the --

4 MR. SOLYMOSI: He answered it and you keep
5 asking him. Because you are not happy with his
6 answer --

7 MR. TAFT: No, I want to know what his
8 answer is.

9 MR. SOLYMOSI: He said that he believes it
10 applies to everybody. It's on the record. It's
11 been asked and answered.

12 MR. TAFT: Mr. Solymosi, you can object.
13 you can't coach the witness.

14 THE DEPONENT: He don't have to coach me.
15 I answered your question before, Mr. Taft, and
16 then you try to twist it around some other way.

17 Q No. You are saying, Mr. Westphal, it's
18 your understanding that six point action plan for
19 safety of operations addresses safety with respect to
20 third parties, not just with respect to Norfolk
21 Southern employees?

22 A I didn't say that.

23 Q What did you say then?

24 A Let me read it again. "Responsibility for
25 safety and environmental stewardship cannot be

1 transferred. Each employee of this corporation
2 therefore is held personally accountable for his or
3 her actions on the job." And they point out each and
4 every one of them, all six of them.

5 Q Are those actions on the job actions
6 directed toward other employees of Norfolk Southern or
7 actions directed at third parties outside Norfolk
8 Southern or what don't you know?

9 A What did I just read here?

10 Q I heard what you read.

11 A You don't understand it?

12 Q No, that's why I'm asking you again.

13 A You want me to read it again?

14 Q I want to get your understanding as to
15 whether the intent of that is to apply to third
16 parties, to prevent injuries to third parties or
17 whether the six tenants of safety is directed toward
18 preventing injuries among Norfolk Southern employees,
19 if you know?

20 A The statement of policy speaks for itself.

21 Q And how do you interpret that?

22 A Do you want me to read it again?

23 Q No --

24 A "Responsible for safety and environmental
25 stewardship cannot be transferred. Each employee of

1 this corporation therefore is held personally
2 accountable for his or her actions on the job."

3 Q Did you understand my question?

4 A I did. Did you understand my answer?

5 Q No, I don't.

6 MR. SOLYMOSI: You could have her read it
7 back. He answered the question a long time ago
8 about whether it applied just to employees of
9 Norfolk Southern.

10 MR. TAFT: I didn't hear that answer.

11 MR. SOLYMOSI: You want her to read it
12 back?

13 MR. TAFT: No, I don't want her to go back
14 and do it.

15 Q Mr. Westphal --

16 A I've answered the question before,
17 Mr. Taft.

18 MR. TAFT: Go all the way back. All the
19 way back and we will listen. If it's in there, I
20 will move on.

21 (Read back.)

22 Q Is it your understanding, Mr. Westphal,
23 that those six points of safety that we are referring
24 set forth an obligation on the part of Norfolk
25 Southern employees that apply to third parties other

1 than, other Norfolk Southern employees?

2 MR. SOLYMOSI: Applied in what manner,

3 Roger? Because that's a confusing question.

4 Does it mean that third parties have to apply?

5 Q Is it your opinion, Mr. Westphal, that
6 those six tenants of safety were put in place so that
7 there would be duties placed upon Norfolk Southern
8 employees with respect to third parties that aren't
9 employees of Norfolk Southern, such as Robin Nixon?

10 A These -- this is just as self-explanatory
11 as it can be. "Each employee of the corporation
12 therefore is held personally accountable for his or
13 her actions on the job." It applies to no one else
14 except the employees on the railroad.

15 Q Whose safety are those rules directed to?

16 A For the employees and people around the
17 employees.

18 Q Well, that's what I'm --

19 A Passengers, the people, the public.

20 Q That's all I wanted to hear. That's your
21 understanding, that the safety that's referenced in
22 there is not just the safety of Norfolk Southern
23 employees, it's your understanding it's the safety of
24 others as well?

25 A Of the public, yes.

1 Q Okay.

2 A Because those are the ones, those are the
3 ones get damaged because of the total ignorance of
4 this crew not knowing anything about it. Hardly
5 anybody knew about it. It goes back to the lack of
6 training.

7 Q Let's go to No. 12. "Norfolk Southern was
8 negligent in that it is clear following my review and
9 research of the operating rules as above outlined,
10 Norfolk Southern Railroad through its employees
11 exhibited a complete disregard for a risk which was
12 clearly known to them." Is that what you have been
13 testifying to before?

14 A Yes.

15 Q Are you contending that on April 27, 1997,
16 the Norfolk Southern crew in that train was aware that
17 Robin Nixon had grabbed onto that train?

18 A I didn't say that.

19 Q Well, is that your contention?

20 A No, no. They were not -- we went over this
21 before. But my --

22 Q Let's go on to --

23 A Wait a minute. My contention is that
24 following my review of this, the operating rules, they
25 were totally ignorant of the operating rules and their

1 responsibilities to protect the public, to do anything
2 to protect the public or whether it was Robin Nixon or
3 any other child along there from getting injured on
4 that track.

5 Q Let's go to No. 13. "In my opinion the
6 annual cost of \$3,500 to install and maintain rumble
7 strips along the area of West 19th Street where the
8 accident occurred would have been a small and
9 reasonable expense compared to the risk presented by
10 Norfolk Southern Railroad to children in the area."
11 Right?

12 A That's what it says.

13 Q That's your opinion?

14 A Yeah.

15 Q And that ties in with Mr. Guarino's report
16 that you agree with that these rumble strips should
17 have been installed?

18 A Yes, and I'll point out that the
19 installation, they had three or four, say there was
20 ten crossings in that 1.2 miles there. If they didn't
21 have any crossing watchmen, it would have cost the
22 railroad company to put in grade crossing protection
23 at all those places a minimum of \$12,000 for crossing
24 protection. And that's \$120,000. That's for one
25 installation and they still have the maintenance.

1 According to Mr. Guarino's recommendations,
2 the \$3,500 to install and maintain these rumble strips
3 per year would have been a small amount compared to
4 what they would have had to have done if they really
5 wanted to protect the people.

6 Q It's your opinion that those rumble strips
7 would have prevented Mr. Nixon's accident?

8 A They would have been a deterrent for all
9 children, all bicyclists that wanted to do something
10 like that.

11 Q I'm talking about Mr. Nixon. You think it
12 would have prevented Mr. Nixon's accident?

13 A I believe it would have.

14 Q And 14 says that "It's your further opinion
15 that the conduct of Norfolk Southern Railroad through
16 its employees, engineer Timothy J. Price and conductor
17 Robert B. Glenn above referenced directly and
18 proximally contributed to the serious injury to Robin
19 Nixon on April 27, 1997 on the West 19th Street track
20 at Erie, Pennsylvania." What conduct are you
21 referring to?

22 A Of their total disregard for people around
23 the tracks.

24 Q On the day of the accident or before?

25 A On any crew, they exhibited that in their

1 instance on April 27th. But any crew, the railroad
2 company should, the Norfolk Southern Railroad company
3 should have had some responsibilities and training and
4 getting it through the whole procedure as I've
5 explained 7 or 8 times now the whole procedure to keep
6 children away from trains. They did absolutely
7 nothing.

8 Q Your contention is not with the way they
9 ran the train that day, your contention is with their
10 failure to follow these rules that you mentioned
11 before and report that there were children in the area
12 on various occasions?

13 A Well, their whole operation of the train.
14 The train, Mr. Price was operating the engine and that
15 moved the train. But their total disregard for people
16 around the railroad was a sample, must have been a
17 sample of all their employees.

18 Q That's your assumption?

19 A Yes.

20 Q Do you agree with Mr. Guarino that these
21 rumble strips should have been the same type that were
22 installed on interstate highways?

23 A I concur with his report.

24 Q Okay. And do you agree that the rumble
25 strips that are installed on interstate highways are

1 for the purpose of waking up drowsy drivers?

2 A Yes, to warn a driver that he is off the
3 road.

4 Q And --

5 A And Mr. Guarino had put out a nice thing in
6 his report, if I could find it here, that really, he
7 had a picture in there that showed exactly how the
8 patch strips would have been better, would have been
9 his recommendation.

10 MR. SOLYMOSI: Here.

11 THE DEPONENT: Yeah, this is what it is.

12 Q Would you agree with me that the
13 recommendation Mr. Guarino made, that you concur with,
14 would require those rumble strips to be installed on
15 the City street and not on the railroad right-of-way?

16 A Well, there would have to be some
17 arrangement made between the City and the railroad,
18 but the actual -- that could be worked out. I don't
19 think that the City of Erie, Pennsylvania, is going to
20 say no, you can't put that on our street, that might
21 prevent an injury to a child. But I seriously believe
22 that that could be worked out between the City. But
23 it would have been an indication that they were doing
24 something to protect children from riding bikes on
25 there.

1 Q You do agree with me, then, that the rumble
2 strips would have been on the City property; correct?

3 A Well, I don't understand what that has to
4 do with it.

5 Q Just answer my question. Do you agree with
6 me, Mr. Westphal, that Mr. Guarino's recommendation
7 would have required those rumble strips to be
8 installed on the City street not on the railroad
9 right-of-way?

10 A Well, partly on the railroad right-of-way
11 and maybe a little on the City street.

12 Q Show me how you conclude that by his
13 dimensions and his recommendations --

14 A These parts here would be, maybe this much
15 of it would be on the railroad property. This much
16 would be on the street.

17 Q When you say this much, what do you mean?

18 A Maybe three inches or four inches.

19 Q You are saying three inches or four inches
20 on the railroad right-of-way and the rest on the City
21 street?

22 A The railroad right of way you said is
23 between the end of the ties, 8 foot 6 inch ties and
24 you pointed out that it would be, that's the railroad
25 right-of-way. I am saying maybe this would be maybe

1 three inches on the end of that tie up to where that
2 tie -- the tie runs out, it don't stop at the rail, it
3 goes out beyond the rail.

4 Q Did you do any measurements of that
5 yourself?

6 A They are gone. The tracks are gone.

7 Q Did you do any analysis of the
8 recommendations by Mr. Guarino as to where these
9 rumble strips should be installed to determine whether
10 they were or were not all on public street owned by
11 the City?

12 A Mr. Guarino is a professional in his job
13 and everything, and I concur in his recommendation.

14 Q My question was did you do any analysis to
15 determine whether his recommendation would place the
16 entire rumble strip on a public street owned by the
17 City of Erie rather than having any part of it on the
18 Norfolk Southern right-of-way?

19 A No, and I don't think it makes that much
20 difference.

21 Q Okay. All right.

22 A Just as long as they are there.

23 Q Are you aware that the Pennsylvania
24 Transportation Institute study by Elefteriadou and
25 others that you cited in your report concluded that

1 rumble strips of the type that Mr. Guarino and you are
2 recommending should have been installed on West 19th
3 Street were the type that created the most risk of
4 loss of control by a bicyclist?

5 A I believe I read something in there about
6 it, but I'm not that familiar with it.

7 Q Because in fact you didn't read that report
8 at all, you never seen that report, you only read an
9 excerpt?

10 A You have that report.

11 Q Have you ever seen that report?

12 A We went over this a long time ago,
13 Mr. Taft. I've never seen it.

14 Q Right.

15 A I got the report from the federal
16 government on Department of Transportation.

17 Q So --

18 A If you have it, I would like to see it.

19 Q I'm not going to show it to you at this
20 point if you didn't review it.

21 MR. SOLYMOSI: He doesn't have to show it
22 to you.

23 Q Isn't it true, Mr. Westphal, that in your
24 report on page 7 with respect to the installation of
25 rumble strips you are basing that report, at least in